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# CONSIDERATION OF THE NOMINATION OF TEN BRIGADIER GENERALS OF THE MARINE CORPS FOR PROMOTION TO THE PERMANENT GRADE OF MAJOR GENERAL

JULY 24, 1987.—Ordered to be printed

Mr. NUNN, from the Committee on Armed Services, submitted the following

## REPORT

The Committee on Armed Services, having had under consideration the nomination of ten Marine Corps brigadier generals for promotion to the permanent grade of major general, under section 624 of title 10, United States Code, favorably reports the nominations of Edmund P. Looney, Jr., Orlo K. Steele, Hollis E. Davison, Robert F. Milligan, Gene A. Deegan, Joseph P. Hoar, Royal N. Moore, Jr., and Donald E.P. Miller and recommends that these eight nominations be confirmed by the Senate.

### BACKGROUND TO COMMITTEE ACTION

On January 12, 1987, the Senate received from the President the nomination of ten officers for promotion to the permanent grade of major general in the United States Marine Corps. The Chairman of the Committee on Armed Services received information concerning possible serious irregularities in the selection board proceedings that resulted in the selection of the ten individuals. The Chairman of the Committee on Armed Services then consulted with the Ranking Minority Member on the Committee, and they directed the Committee staff to determine if sufficient grounds existed to support the allegations.

The Committee staff, after consultation with certain individuals familiar with the proceedings of the selection board, reported to the Chairman and Ranking Minority Member of the Committee and the Chairman and Ranking Minority Member of the Manpower and Personnel Subcommittee that there appeared to be sufficient evidence concerning the alleged irregularities to warrant further inquiry. Shortly thereafter, these four members of the Committee met with the Assistant Secretary of Defense for Force Man-



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agement and Personnel. The purpose of the meeting was to relay to him the information received, to advise him that the Committee was prepared to conduct an investigation into the allegations, and to offer the opportunity to the Secretary of Defense to elect to conduct the investigation and to provide a report that could serve as a basis for future action by the Committee.

The Secretary of Defense then directed the General Counsel of the Department of Defense to conduct an inquiry. The General Counsel of the Department of Defense conducted an informal inquiry into the proceedings of the selection board process and rendered a report to the Secretary of Defense. The Secretary of Defense provided a copy of the report to the Chairman of the Committee on Armed Services on May 6, 1987, along with his recommendations and a statement of the action he had taken in response to the report.

Following receipt of the report of informal inquiry, the Chairman of the Committee on Armed Services directed an evaluation of the legal and policy issues addressed in the report. On June 18, 1987, the Chairman and Ranking Minority Member sent letters to the former Secretary of the Navy, John Lehman, and the then Commandant of the Marine Corps, General P. X. Kelley, offering them the opportunity to provide to the Committee, either through testimony or in written form, any information which they wished to provide relative to this matter. On June 19, 1987, the then Commandant of the Marine Corps sent a letter to the Committee concerning this matter, which is set forth in its entirety as Appendix 1 to this report. The Committee has received no reply to its letter to the former Secretary of the Navy. The full Committee met on June 19, 1987, when it was briefed on the nature of the allegations, the contents of the report of informal inquiry, and the legal and policy issues raised by the matter. The Committee met again on June 26, 1987, twice on June 30, 1987, and twice on July 10, 1987. In reaching the conclusions and recommendations set forth herein, the Committee invested a very substantial amount of time in formal sessions as well as in other meetings. The Committee based its findings and actions solely upon the facts provided by personnel of the Department of Defense.

## THE ALLEGATIONS

The facts considered by the Committee concerned alleged actions by the then Secretary of the Navy, John Lehman, and the then Commandant of the Marine Corps, General P. X. Kelley, to improperly influence the outcome of the Marine Corps Major General Promotion Selection Board that was conducted in October 1986. Specifically, the allegations involved claims that the then Secretary of the Navy, with the concurrence of the then Commandant of the Marine Corps, improperly amended instructions to the promotion selection board after it had acted and reported eight selectees under its original instructions, by authorizing two additional selections for promotion. It was alleged that the Secretary of the Navy's purpose in amending the instructions to the Board was to obtain the selection by the board of a certain individual. It was further alleged that the then Commandant of the Marine Corps thereafter

suggested to the Board President that another certain individual be selected by the board to fill one of those additional authorizations.

## THE REPORT OF INFORMAL INQUIRY BY THE GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

### *Key Facts*

The Committee observes that the Report of Informal Inquiry did not identify by name any member of the promotion selection board or any officer considered or selected by that board. The facts established by that informal inquiry are summarized below. This summary of facts has been reviewed by the Office of the General Counsel of the Department of Defense.

*Initial Convening of the Board*

Under 10 U.S.C. 622, the Secretary of the Navy was required to determine the maximum number of officers the selection board could recommend for promotion before convening the board. He determined that no more than eight officers could be selected. In arriving at this number, he took into account the fact that the Deputy Secretary of Defense authorized the Marine Corps five additional general officers, and assumed that for promotion planning purposes that three would be in the major general grade. The addition of these numbers was conditional on their utilization in joint assignments.

Under 10 U.S.C. 615, the Secretary of the Navy was required to provide information to the selection board, including information relating to the needs for officers having particular skills. In complying with this particular requirement, he, by written precept, went no further than to instruct the selection board to select those officers whom it considered best qualified, "giving due consideration to the needs of the Marine Corps for officers with particular skills." No additional skill guidance was provided.

Prior to the convening of the selection board, the President of the board made "traditional" calls on the Commandant of the Marine Corps and the Secretary of the Navy. During the call on the Commandant, the President of the board asked the Commandant if he "would be pressured" by the Secretary of the Navy to make any particular selection. The Commandant responded in the negative. On his subsequent call on the Secretary of the Navy, the Secretary mentioned two individual officers who he held in high regard. The President of the board did not consider the Secretary's remarks as "direction" that either be selected. He felt "informed, but not directed."

*Initial Board Proceedings*

The board convened on October 27, 1986, deliberated for a period of four days, and selected eight officers. Neither of the two officers the Secretary of the Navy had mentioned to the President of the board was selected. The board adjourned on October 30, 1986. Each member of the board signed the board's report certifying compliance with the board's assigned responsibilities.

*Amending the Board's Instructions (Precept)*

Following adjournment of the board, the President of the board called upon the Commandant for his review of the board report. In the course of this call, the Commandant mentioned, among other things, that he was disappointed that a particular ground officer who had done some outstanding work for him was not selected. He nontheless signed the report recommending its approval.

Following a legal review by the Judge Advocate General of the Navy, who found the board report legally sufficient, the President of the board called on the Secretary of the Navy. In the course of their discussions, the President of the board synopsized the considerations of each officer considered, giving slightly greater detail on the two officers about whom the Secretary had expressed earlier interest, but who were not selected. One of the two officers was an aviator who had been very competitive for selection during the Board's deliberations. The Secretary asked the President of the board what would happen if he amended the precept to authorize the board to select an additional aviator. The President of the board replied "that in his judgment, the Board would select the aviator that the Secretary had previously mentioned."

In replying to General Counsel's questions, the Secretary of the Navy and the President of the board differ on whether or not the propriety or wisdom of the Secretary's suggestion to amend the precept was at issue in their discussion. The Secretary of the Navy did not recall the the President of the board questioning the wisdom or propriety of the suggestion. The President of the board recalled otherwise. The Secretary of the Navy did not approve the board report but indicated that he would speak to the Commandant of the Marine Corps before taking any action.

The Secretary has indicted that at the time he received the report he was concerned that only two of the eight officers selected were aviators, while he believed, correctly, that historically approximately one-third of the Marine Corps officers recommended for promotion to major general were aviators. Thus he said he formed an opinion that at least one additional aviation officer was needed.

The Secretary of the Navy then telephoned the Commandant, who was in New York, and discussed his suggestion to amend his precept to add an authorization for an aviator. The Secretary of the Navy and the Commandant disagree on the reaction of the Commandant to the telephonic suggestion. The Secretary recalled that the Commandant did not attempt to dissuade him, indicated the Commandant thought it was "a good idea," and suggested that the Secretary add two rather than one more authorization. The Commandant, however, recalled that he first attempted to disuade the Secretary but later relented when the Secretary persisted. He then suggested that two authorizations instead of one be added to give the board more flexibility and to take the focus off the one aviator, whom he felt would otherwise be marked by the Secretary's action.

Although the Board had completed action under its original instructions and reported that completed action under section 618 of title 10, United States Code, the Secretary of the Navy amended

the precept to authorize the selection board to make two additional selections for a total of ten, one which could only be used to select an aviator. In his amended precept, the Secretary cited additional requirements to assign Marine Corps general officers to joint billets and the need for at least three of the ten selectees to be aviators.

Before reconvening the board, the President of the board called on the Commandant of the Marine Corps. During this call, the Commandant commented favorably on the same ground officer he had expressed disappointment about not being selected in reviewing the initial board report.

*Proceedings Under Amended Instructions (Precept)*

The board reconvened on October 31, 1986, the day following its original conclusion and report. Following the reconvening of the board, there were intense, heated discussions by the board on the legality and propriety of further proceedings under the amended precept. The discussions included the recitations by the President of the board of his conversations with the Secretary and Commandant regarding the two particular officers in whom they had expressed interest. Although all of the board members who were interviewed indicated they did not feel individually pressured to select particular officers, seven of the nine board members interpreted the amended precept as an attempt by the Secretary to "force them" to select the particular aviator, and several members described the Secretary's action as "manipulation" and "improper exercise of Secretarial authority." Four of the nine members indicated they felt the Commandant's reported remarks affected the deliberations and voting of the board. However, each board member interviewed by the General Counsel indicated that the remarks and the actions of the Secretary and the Commandant did not affect the exercise of his independent judgment.

After extensive discussion on the legality and propriety of the amended precept, including informal individual discussions between one or two members of the board and members of the office of the Staff Judge Advocate to the Commandant of the Marine Corps, the board reached a consensus to proceed. The board again reviewed the records of each officer who was not selected under the initial precept. The board followed the same process for discussion and voting as in the initial proceeding.

After several ballots, the board selected the aviator in whom the Secretary had expressed interest. The majority of the board members have indicated they believed this officer, who was a strong contender under the original precept, would have been selected if the board had been authorized ten selections rather than eight.

Unlike the aviator, the ground officer, who was eventually selected by the board after several further ballots under the amended precept, had not been a contender under the original precept. Another ground officer was a strong contender for selection for the seventh and eighth selections under the original precept. On the first ballot under the amended precept, the officer in whom the Commandant expressed interest received four votes, as did the other ground officer who was a contender in the initial proceedings. On the sixth ballot, after three successive six to three votes,

the board declared the officer preferred by the Commandant, as its selectee.

Upon making this final selection, the board adjourned and reported out its selection of ten officers for promotion to major general to the Secretary.

*Analysis and Conclusions*

The General Counsel of the Department of Defense concluded that the proceedings under the first precept were legal and proper, but questioned the wisdom of verbal communication between the former Secretary of the Navy and the Board President in which the former Secretary of the Navy expressed opinions about individual officers. He noted that "it appears that it has been an accepted practice within the Navy for the Secretary and other senior leaders to mention to the Board President those officers of whom they have a high opinion." However, he recommended that, as a matter of policy, henceforth any such communication should be reduced to writing and provided directly to all board members with appropriate cautionary language as to how such opinions should be viewed by a board.

With respect to the proceedings under the amended instruction, the General Counsel of the Department of Defense also concluded those proceedings were legal and proper. Concerning the legality of the latter proceedings, he first noted that there was a split among the military departments as to whether a Service Secretary believes he has the authority to add authorizations after a board has acted under an original instruction (precept). The Navy Department has added authorizations on at least six occasions since the enactment of the statutes applicable to this matter, both under Secretary Lehman and his predecessor. The DoD General Counsel also opined that no statutory provision either expressly prohibits or authorizes increasing the number of selections that a board may make after that board has reported. He further observed that provisions of law prohibiting membership on consecutive boards and requiring separation of certain officers deemed to have twice failed of selection for promotion would limit the ability of a Service Secretary to meet the legitimate needs of the service if the Secretary were required to convene a new board. He concluded that the law does not prohibit additional authorizations, provided they are for proper purposes.

He then considered whether the Secretary of the Navy's purposes in adding authorizations in this case were proper. He concluded that the former Secretary of the Navy's desire to see a particular officer selected triggered his decision to amend the precept. However, he noted that the former Secretary did not personally know the particular officer, and he concluded that the former Secretary was motivated, not by personal friendship or any personal motive, but by his sincere belief that the particular officer was especially well qualified.

The General Counsel of the Department of Defense found the purpose that motivated the Secretary's action was not "a proper basis, standing alone, for his decision." However, he noted that the Commandant, at the time of the inquiry, agreed with the Secretary

that the Marine Corps had a need for major generals, and a particular need for aviators in that grade, that was not satisfied by the authorization of eight selections in the original precept. He further noted that his conclusion was supported by the analysis of the staff officers who prepared the original precept. On the basis of this evidence, the General Counsel concluded that other proper purposes were in existence, i.e. the need for more general officers to fill joint billets, and the need for more senior aviators in the Marine Corps as stated in the amendment to the precept, which supported the Secretary's action, despite the improper purpose which triggered it.

Concerning the effect of the actions of the former Secretary of the Navy, the General Counsel of the Department of Defense concluded that, despite the board's perception that the former Secretary of the Navy was attempting to influence the selection of the particular officer, the board nonetheless would have in all likelihood selected this officer if it had been authorized to select ten officers originally. The Board President speculated that with ten selections the board might have been reluctant to select all three aviators in the zone, based on mix considerations not quality, but he was virtually certain the aviator would have been selected. Six other board members shared that view. On the basis of this evidence and the testimony of each of the eight board members interviewed that he had not been influenced by the Secretary's remarks, the General Counsel concluded that the independent judgment of the board was not compromised by the former Secretary of the Navy's actions.

Concerning the effect of the action of the former Commandant of the Marine Corps, the General Counsel of the Department of Defense concluded that there was no evidence that the former Commandant's remarks were intended to pressure the board. Although he acknowledged that four members of the board believed that the board was unduly influenced by the Commandant's comments, he noted that the Commandant had recommended approval of the original board report and had not initiated the amendment to the precept, and that each member interviewed stated that he did not feel any presssure as a result of the Commandant's remarks and that the remarks did not affect the independent exercise of his judgment. On this basis, the General Counsel concluded the remarks did not unduly influence the board.

Although the General Counsel concluded that the actions of the former Secretary and the former Commandant did not undermine the exercise of the Independent judgment of the board, he termed the perception of impropriety arising from their actions "inescapable" in light of all the facts and circumstances. Accordingly, he recommended that the Secretary of Defense promulgate uniform guidance for the Services to preclude such occurrences in the future.

*Actions and Recommendations of the Secretary of Defense*

After reviewing the Report of Informal Inquiry from the General Counsel, the Secretary of Defense adopted the General Counsel's conclusions and recommended that the Committee act favorably on the ten nominations. He also directed that guidance, uniformly ap-

plicable to all three military departments, be promulgated by the Department of Defense to ensure that in the future all communications between a Service Secretary or senior uniformed officers and a selection board be in writing, be furnished to all members of the board, and be made part of the official record. He further directed that such uniform guidance prohibit Service Secretaries from increasing the number of authorized selections once a board has convened without the prior approval of the Secretary of Defense or his designee.

On June 3, 1987, the Deputy Secretary of Defense issued revised guidance to the military departments concerning the officer promotion process, which embodied the directions of the Secretary of Defense and incorporated additional safeguards against attempts to manipulate or interfere with promotion selection board proceedings. The Subcommittee on Manpower and Personnel is reviewing all of these actions to determine if legislative remedies are warranted.

## COMMITTEE ANALYSIS

The following represents the Committee's analysis of the facts as set forth by the General Counsel of the Department of Defense and the Committee's own conclusions based on law and regulations regarding this very serious matter. The Committee further took into consideration the facts submitted by the former Commandant of the Marine Corps in reply to the Committee's letter of June 18, 1987, giving him the option of testifying or commenting on this matter. Although an identical offer was made to the former Secretary of the Navy, he elected to make no reply.

### I. LAWS GOVERNING THESE PROMOTIONS

The nominations in question were submitted on January 12, 1987, by the President to the Senate under chapter 36 of title 10, United States Code, the portion of law applicable to selection of officers for promotion to grades 0–2 through 0–8 in all the military departments. Therefore, the selection process for these nominations must comply with chapter 36 of title 10. Generally, nominations for promotions up through two-star rank are subject to these provisions, in contrast to nominations to three- and four-star positions which are at the discretion of the President alone under section 601 of title 10 (not part of chapter 36). In addition to these statutory provisions, the President may nominate any officer for promotion to any grade under the authority of Article II, section 2, clause 2 of the Constitution, and with the advice and consent of the Senate, appoint such an officer to the grade for which he has been nominated. That authority is not applicable to these nominations as they were submitted under the authority of title 10, United States Code, and not under the aforementioned provision of the Constitution.

### II. ORIGINAL INSTRUCTIONS (PRECEPT) AND PROCEEDINGS THEREUNDER

#### *A. Preparation*

In practice, the Secretary of a military department, in consultation with the Service Chief, annually determines the "needs" of

that Service for the upcoming year, i.e., the number of expected vacancies in a rank which will need to be filled and the military specialities or career patterns of officers which would be most suitable for those vacancies. In the Marine Corps, for example, major general vacancies may require officers with a career pattern only in aviation or only in ground experience. Some billets, however, may be suitably filled by officers in either career pattern. This and other important information is conveyed to a promotion selection board in the form of written instructions, which in the Department of the Navy are known as a "precept."

In this case, the Secretary of the Navy, in consultation with the Commandant of the Marine Corps, determined that eight vacancies would occur in fiscal year 1988 which would need to be filled by major generals.

With respect to the need for certain military specialities or career patterns for these vacancies, the Secretary apparently determined that no special need existed about which the board should be given specific instructions. The precept resulting from these determinations authorized the board to select eight officers who were best qualified "giving due consideration to the needs of the Marine Corps for officers with particular skills." No additional instructions concerning needs for a certain number of officers with specific skills was given.

The evidence indicates that the original precept was prepared in accordance with law and regulation, and, as such, is presumed to properly reflect the needs of the Marine Corps as determined by the Secretary of the Navy.

*B. Proceedings*

There is no evidence sufficient to support a finding of irregularity in the proceedings of the board under that original precept. It is noted that the so-called "traditional" preconvening calls by the Board President on the Commandant and the Secretary of the Navy took place. These calls are practices of custom and courtesy and are neither authorized nor prohibited by law and appear to serve no specific purpose in the scheme of chapter 36 of title 10, United States Code. Private communications about individual officers during such meetings can lead to misunderstanding and the appearance of impropriety and, therefore, such private communications should be prohibited as a matter of policy, if not law. However, in this case, there is no weight of evidence to support a finding that the comments made by the Secretary during the preconvening call influenced the board's deliberation under this original precept.

## III. AMENDED INSTRUCTIONS (PRECEPT) AND PROCEEDINGS THEREUNDER

*A. Relevant Events*

In considering the validity of the proceedings under the amended precept, there are five events which are of relevance and which occurred in the following order:

(1) the comments of the Secretary of the Navy, made during the call of the Board President before the initial convening, expressing the Secretary's favorable view of two named officers,

one of whom was a named aviation officer, when such comments are viewed in context with subsequent events;

(2) the comments of the Commandant to the Board President, made at a meeting of the two following the initial report of the board, expressing the Commandant's disappointment that a named ground officer had not been selected, when such comments are viewed in context with subsequent events;

(3) the comments of the Secretary to the Board President, made at the time the Board President delivered the board's initial report to the Secretary, inquiring about the likelihood of the named aviation officer previously commented on by the Secretary being selected, if the board were authorized an additional selection for an aviation officer;

(4) thereafter, the Secretary's act of amending the board precept to authorize two additional selections in a manner which appeared crafted to result in the selection of the named aviation officer; and

(5) finally, the comments of the Commandant to the Board President, as the two were discussing the amended precept, which were favorable to the named ground officer about whom the Commandant had previously commented as set forth in (2) above.

*B. Commandant's Participation*

The Commandant has contended that his comments to the Board President (see A(2) and (5) above) about the named ground officer were not intended to direct a particular selection, but were intended only as information. (The Committee observes that the comments made by the Commandant at the time he was recommending approval of the initial board report (see A(2) above) would not normally be relevant, standing alone, as the selection process had apparently been completed. It is only because the selection board was ordered to reconvene and when these comments are considered in conjunction with his later comments favorable to the same named ground officer (see A(5) above) that these earlier comments become relevant.) The Board President characterized the Commandant's comments to be no more than "information we didn't have." However, three of the board members characterized the comments, as reported by the President to the board, as "not proper." Four members believed the comments affected the deliberations and the voting of the board. Most importantly, the Committee observes that this named ground officer, while not a contender during the late stages of the board's deliberations under the initial precept, immediately became a strong contender and eventually a selectee under the amended precept proceedings. These facts bring into serious question the fairness accorded other officers competing for this additional selection.

*C. Secretary's Participation*

In contrast to the named ground officer commented upon by the Commandant, the named aviation officer commented upon by the Secretary was a strong contender for selection during both the board proceedings under the original precept and the subsequent proceedings under the amended precept, when he was eventually

selected. However, seven board members believed the Secretary's act of amending the precept coupled with the Secretary's comments upon the named aviation officer (see A(1) and (3) above) was an "attempt by the Secretary to force them to select the aviator." Further, several board members characterized the Secretary's actions and comments as a "manipulation" of the board and felt it was not a proper exercise of Secretarial authority.

*D. Legal Considerations*

There is an issue as to whether the law, under any circumstances, permits a Service Secretary to amend a precept after a board has acted in accordance with law and regulation and reported under section 618 of title 10, United States Code. The Committee's extensive examination reveals opinions on both sides of this issue.

On one side is the view taken by the DoD General Counsel that the statutes do not expressly preclude an amended precept. He cited as precedent the fact that the Department of the Navy, on at least six occasions since 1980, has amended a precept after a selection board has reported to the Secretary of the Navy. (See the Report of Informal Inquiry by the General Counsel of the Department of Defense, Analysis and Conclusions, set forth earlier in this report).

On the other side is the view that a precept may not be amended after a board has reported. It is noted that the Navy's practice of amending precepts under section 618 is not followed in either the Department of the Army or the Department of the Air Force. It can be argued that permitting precepts to be amended after a board reports upsets the balance between civilian and military roles in the promotion selection process described by chapter 36 of title 10, United States Code.

Under that view, the balance between civilian and military roles in chapter 36 vests substantial discretion in the Service Secretary to define the needs of the service and to instruct a board before the board convenes, and vests in the Service Secretary the authority to require that the board comply with law or regulation. The Secretary has the authority, in enforcing compliance with law or regulation, to require compliance with his lawful instructions given to the board. This substantial Secretarial authority is balanced by the fact that only uniformed active duty personnel may serve on the board, that the board proceedings are conducted in secret, and that no one, including the Service Secretary, is entitled to be advised of the deliberations of the board unless and until the board has submitted its report to the Secretary. It can be argued that this delicate balance is continued by 10 U.S.C. 618 by limiting the options then available to the Service Secretary to: (1) approving the report; (2) returning the report, but only for a violation of law or regulation, including a violation of the Secretary's lawful instructions; or (3) recommending that the President disapprove the report. Under this view of the law, if a Service Secretary is permitted to return a board report after he has been made knowledgeable of the board's deliberations for reasons other than a violation of law or regulation or his lawful instructions, this balance could be upset in much the same way as if the Secretary were to sit as a member of the board.

Under this view, it would be necessary to determine if the original precept comported with law or regulation, as no other possible violation of law or regulation occurred in the process which would justify return of the board's initial report. The original precept was prepared in the regular course of business, and therefore is presumed to be correct and in accordance with law or regulation. There is some evidence that the planning process for the first precept may have failed to give proper consideration to the need for additional major generals to fill joint billets, especially aviators. Yet both the Commandant and the Secretary were apparently aware of these issues when they each personally approved the original precept.

On the other hand, there is some evidence to suggest that an additional need for major generals to fill joint billets may have arisen only after the original precept was issued and before the board reported. If, in fact, that additional need did arise after the original precept was issued, it can be argued that the Secretary had clear authority to amend his instructions to the board at any time before the board reported. He could have utilized his meeting with the Board President to alter his instructions. He took no action to do so. Moreover, there is another procedure available under 10 U.S.C. 618 to accommodate a change in needs even after a board reports. That procedure is to recommend to the Secretary of Defense that the board report be disapproved, an authority not available to the Service Secretary. If such a recommendation had been agreed to by the Secretary of Defense in this case, the board could have been reconvened to consider all eligible officers in light of the new needs.

Under this view as to the legality of the amended precept, the evidence of a possible administrative error or oversight in the preparation of the original precept would be insufficient to overcome the presumption that the original precept was prepared in accordance with law and regulation. Furthermore, the evidence about if or when an additional need for major generals to fill joint billets became known would not be viewed as establishing that the original precept failed to reflect correctly the needs of the Marine Corps. The failure of the Secretary to act to amend precept before the board reported, when he had adequate opportunity to do so, would support this view.

It is noteworthy that the Department of Defense has issued a new directive requiring the Secretary of Defense to approve any amended precepts after a board has reported. This should preclude any Service Secretary in the future from improperly amending a precept after receiving the report of a selection board.

However, it is not necessary to resolve this issue of law as to the legality of amending a precept after a board has reported in accordance with law and regulation in order for the Committee to reach its conclusions in this matter.

## CONCLUSIONS

### *Original Precept*

The proceedings under the original precept resulting in the selection of eight of the ten nominees pending before the Committee

were consistent with the provisions of chapter 36 of title 10, United States Code. There is no weight of evidence sufficient to support a conclusion that the comments made by the Secretary to the President of the board (see Committee Analysis, III.A(1)) unduly influenced the board's decisions under this precept. Therefore, the Committee recommends confirmation by the Senate of these eight nominees. The Committee notes that in response to this case the Secretary of Defense has directed that in the future, all such communications must be in writing, that they be provided to all board members, and that they be accompanied by appropriate cautionary instructions.

*Amended Precept*

With respect to the amended proceeding which resulted in the addition of two officers to the selection list, the Committee concluded that the facts and circumstances (described in Section III.A of the Committee analysis) considered in totality constituted considerable evidence of impropriety and unfairness.

The Committee concluded that the process itself was flawed and therefore the Committee has taken no action with respect to the two nominees recommended as a result of this process.

In its deliberations, the Committee was keenly aware of the personal considerations for these two officers, and the Committee remains concerned about their future in the Marine Corps. This consideration was carefully weighed against the Committee's ultimate responsibility for ensuring the integrity of a selection system that selects individuals for promotion under rules providing all officers with a fair opportunity to be selected. The Committee took seriously the potential effect that approval of the two additional officers, who were selected under a flawed process, would have had on other officers who were competing, who were not selected, and to whom the Committee owes an equal responsibility.

The Committee observes that if an officer's selection is influenced by actions or oral communications of senior officials occurring outside of the authorized selection board process, then other officers under consideration, who must rely only on the authorized board process, may be denied a fair and equitable opportunity to be selected.

Opinions, in writing, by a Service Secretary or Service Chief, with respect to personnel under their authority, can be made part of an officer's military records jacket at any time prior to a board convening and then can be given such consideration and accorded such weight as individual board members desire. That procedure maintains the spirit of fairness and objectivity which is so essential to the promotion selection process. The exceptional weight that can be attributed to a Secretary's (or Chief's) views requires equally exceptional care in the manner those views are conveyed to board members. The viewpoint is confirmed by the Secretary of Defense in promulgating uniform guidance to the Services on June 3, 1987, limiting the manner in which Service Secretaries, Chiefs, and other senior officials may communicate with promotion selection board members.

The Committee wishes to make it very clear that there is no evidence or even suggestion that either of the nominees whom the

Committee decided not to consider had any knowledge of or participation in the improprieties surrounding their selection. Accordingly, the Committee is forwarding letters to the Department of the Navy for insertion in the official records of these nominees stating the express concerns of the members of the Committee over the undue personal hardships thrust upon these nominees and their families, and that future selection boards should view the action the Senate is compelled to take with respect to their promotions as being in no way detrimental to consideration for future selection.

COMMITTEE ACTION

On June 30, 1987, the Committee voted unanimously to favorably report to the Senate only the eight nominations arising from the proceedings of the selection board acting under the original precept; and, further, to advise the Secretary of Defense and the current Secretary of the Navy of the decisions of the Committee prior to the Committee favorably reporting the eight nominations to the Senate. The Chairman and Ranking Minority Member met with the Secretary of Defense and the Secretary of the Navy for this purpose on July 1, 1987. This step was taken to offer these officials the opportunity to take any actions they deemed appropriate with respect to the remaining two nominees, so as to ensure that no stigma attach to these two officers, prior to action by the full Senate on the Committee's recommendations contained in this report. Further, the Committee directs the Manpower and Personnel Subcommittee to review the need for legislation to prevent recurrence of similar cases.

APPENDIX 1

DEPARTMENT OF THE NAVY,
HEADQUARTERS U.S. MARINE CORPS,
*Washington, DC, June 19, 1987.*

Hon. SAM NUNN, *Chairman,*
Hon. JOHN W. WARNER, *Ranking Minority Member,*
*Committee on Armed Services,*
*U.S. Senate, Washington, DC.*

DEAR SENATOR NUNN AND WARNER: Thank you very much for your offer to present information to the Committee on Armed Services in connection with its consideration of the Marine Corps major general nominations.

As you are aware, I was interviewed by Mr. Garrett in the course of his investigation of the circumstances surrounding their selection by the board. I made a very thorough and detailed statement to him, which I assume has been made available to you. For your additional consideration, I am forwarding the attached copy of a memorandum for the record which I dictated in late March when I was first informed that the Board's results were being questioned.

Two other pieces of information, not included in the memorandum, may be helpful: First, I was completely satisfied with the initial report of the board which contained the names of only 8 officers and indicated my agreement by forwarding it without comment to the Secretary of the Navy recommending approval. Only after the Secretary called and informed me that he was authorizing

an additional number, did I suggest the Marine Corps could benefit from a total of two additional for the reasons included in the attached memorandum for the record.

Second, as I related to Mr. Garrett in connection with his investigation, I did have a conversation with the President of the Board, Lieutenant General D'Wayne Gray, after two more numbers were made available. We informally discussed the records of those being considered, and I expressed my thoughts on their relative strengths and weaknesses. This was done in the belief that such a conversation was proper. In any event, I neither attempted to improperly influence him or the Board, nor do I think it was interpreted as such.

I hope the foregoing will assist you in your deliberations and that this matter can be brought to a speedy and mutually agreeable conclusion. Thank you for this opportunity to respond.

Respectfully,

P.X. KELLEY,
*General, U.S. Marine Corps,*
*Commandant of the Marine Corps.*

Enclosure: Memorandum for the Record.

At approximately 1800, 29 October 1986, while at Camp Smith, a New York National Guard installation just south of West Point, I was informed that the Secretary of the Navy would like to talk with me by phone. I returned his call, and learned that the subject was the Major Generals Selection Board which had just reported to him with its results. Among other things, the Secertary expressed concern with the low percentage of Naval Aviators on the list (2 of 8=25%), and that he believed that there were other Naval Aviators both in and below the zone who were fully qualified. He specifically mentioned [deleted] as an example. I agreed that [deleted] was a superb officer who would serve the Corps well as a Major General, but that I was not in a position to question the decision of the Board. In my view, the two other Naval Aviators who were selected by the Board are also superb officers. (Note: Analysis shows the Secretary's concern was valid, i.e., the average selection percentage for Naval Aviators to Major General during the prior five years of his tenure was 39.3 percent, and at the time of this discussion 35 percent of the active duty Major Generals were Naval Aviators). The Secretary informed me that he was going to return the Board with authorization to select an additional Naval Aviator (See Note 1 below). I stated that if it was his final decision to return the Board, the Marine Corps could benefit by two, vice one, additional authorizations. This would enable the Marine Corps to fill additional Major General joint billets (at the time we were and are still considering the possibility of nominating for two additional external Major General billets, COMUSFORCARIB and the Commandant, Armed Force Staff College). It should be noted that on 20 June 1986, the Secretary of Defense increased the Marine Corps' general officer authorization from 65 to 70, and directed that 15 of these be assigned to joint billets. At the time of this decision, there were only nine Marine Corps General Officers filling such billets.

In his modification to the precept for the Major General Selection Board, the Secretary of the Navy stated: ". . . the Board may

select 10 vice 8 officers for promotion." He gave as his rationale: "Due to additional requirements to assign Marine Corps general officers to joint billets, there is an increased need for general officers, particularly Naval Aviators." This statement is correct, for 30 October 1986, the date of the modification, the Marine Corps had a total of six Major Generals in external billets, of whom two were Naval Aviators. In this regard, it must also be noted that three internal billets for Major General Naval Aviators were and are currently filled by Brigadier General Naval Aviators, leaving little flexibility for additional assignments of Major General Naval Aviators to joint billets. A failure to provide experience in joint billets for as many Naval Aviator General Officers as possible would not be in keeping with the spirit of the Defense Reorganization Act of 1986.

Based on the statutory authority of the Secretary of the Navy, the Board reconvened on 30 October 1986. It should be noted that in his modification of 30 October 1986, the Secretary of the Navy said the following: "If, after considering the records of eligible officers and the needs of the Marine Corps, you determine that there are not 3 or more Naval Aviators among those selected, the number of selectees authorized is reduced by the number which is the difference between 3 and the number of selectees who are Naval Aviators." It is clear from this guidance that the Secretary of the Navy did not want to further exacerbate what he already perceived as an imbalance in the original selection percentages between air and ground.

On 30 October 1986, the Major General Selection Board reported to the Secretary of the Navy with a total of 10 names. At no time since then has any member of this Selection Board expressed any displeasure to me concerning either the procedures or results, or, to the best of my knowledge, to the Secretary of the Navy. In signing this Board, each member certifies that: ". . . the board has complied with all instructions contained in the precept and, as appropriate, all other letters of guidance and instruction provided by the Secretary of the Navy. We further certify that the board has carefully considered the record of each officer whose name was furnished to it and that, in the opinion of a majority of the members of the board, the officers recommended for promotion by the board, whose names appear below, are fully qualified and best qualified for promotion to meet the needs of the Marine Corps from among those officers whose names were furnished to the selection board."

While on a number of occasions during the past three and one-half years the Secretary of the Navy has brought to my personal attention the performance of Marines he has observed, I can recall no instance when he has given me direct guidance which could be construed as interference with the selection process. To the contrary, he has been extremely sensitive to remaining within his statutory authority.

*Note 1:* As a matter of interest, this procedure is not without precedent when the best interests of the Service are not satisfied by the results of a Selection Board. As an example, enclosed is a memorandum from me to the Secretary of the Navy, requesting that he modify the PY-85 promotion plan to increase the authorized number of selections for the grade of Colonel from 113 to 116.

The circumstances were as follows. When the PY 85 Selection Board reported out to me enroute to the Secretary of the Navy, I noted with concern that it has disregarded the "skill guidance" contained in the Secretary of the Navy's Precept to the Board as it related to MOS 9914, Judge Advocate, i.e., that this was a skill in which the Marine Corps was short. Of the 16 Judge Advocates above and in the zone, the Board had selected only 3. This did not satisfy the needs of the Marine Corps, and, needless to say, would have had a devastating impact on the morale of the Judge Advocate community. After being convinced that there were, indeed, additional Judge Advocates with outstanding records who were fully qualified for promotion, I requested from the Secretary of the Navy the aforementioned increase in the authorized number of selections. This request was approved, and the Board reconvened to select, if appropriate, an additional three Judge Advocates for promotion to the rank of Colonel. This case is an example of a Selection Board not being fully sensitive to the requirement of the Service when, in fact, fully qualified officers were available.

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